USTELECOM
THE BROADBAND ASSOCIATION

May 24, 2019

Via ECFS

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks* (WC Docket No. 18-141)

Dear Ms. Dortch:

USTelecom respectfully submits this *ex parte* letter to further clarify the issues addressed in its *ex parte* letter submitted on May 6, 2019 (the "May 6 *Ex Parte* Letter")[1] in support of its Petition for Forbearance ("Petition").[2] Specifically, this letter addresses the following issues: (1) the application of the public interest standard in forbearance proceedings; (2) the definition of "digital DS0s"; (3) 911 services; (4) dark fiber unbundling; and (5) Section 251(c)(4) avoided cost resale.

1. The Public Interest Standard. USTelecom takes this opportunity to address the content of the Section 10(a)(3) "public interest" test. As the statute demands, "[i]n determining whether forbearance is consistent with the public interest, the [Federal Communications Commission ('Commission')] also must consider 'whether forbearance … *will promote competitive market conditions*.'"[3] Tellingly, where a given market is "subject to a significant amount of competition" and where "other regulatory safeguards" exist to the point that enforcement of a given statute is "no longer necessary for the protection of consumers or to ensure [that parties do] not engage in unjust or unreasonable practices," forbearance is "consistent with the public interest," especially where forbearance "will increase the regulatory

[1] *See* Letter from Patrick Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed May 6, 2019) ("May 6 *Ex Parte* Letter").

[2] *See generally* Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141 (filed May 4, 2018) ("Petition").

[3] *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations et al.*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7632 ¶ 7 (2013) (citing 47 U.S.C. § 160(b)).

parity in the market."[4] As the Commission has repeatedly found, "disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers."[5] Hence, the public interest standard must be understood to encompass a variety of relevant factors, and must account for the numerous benefits that forbearance would generate for consumers in cases such as the instant proceeding.[6] Finally, Section 10(a)(3)'s public interest obligation may be satisfied by the Commission's own predictive judgment.[7] Here, the record demonstrates that forbearance will help restore competitive neutrality, eliminate market distortions, and restore incentives for all providers to invest in next-generation network facilities.[8]

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[4] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area et al.*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19453-56 ¶¶ 75-76, 78-83 (2005) ("*Qwest Omaha Order*").

[5] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18738 ¶ 68 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements et al.*, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19508 ¶ 60 (2007) (same); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)) et al.*, 22 FCC Rcd 16304, 16360 ¶ 129 (2007) (same).

[6] Forbearance from the ILEC-specific resale requirements unquestionably will allow ILECs more freedom in the marketplace to address their customers' demands and requirements without the overhang of asymmetric regulation. For example, currently Section 251(c)(4) requires ILECs to resell, at the mandated wholesale discount, promotions (where the benefit of the promotion extends longer than ninety days) and certain term/volume discount arrangements – even though by their nature these promotions and volume plans are inherently discounted. No other competitor in the local market is required to offer their promotional offerings to competitors at an additional discount. A grant of forbearance from these ILEC-specific mandates will allow ILECs the flexibility to respond in real time to competition in the marketplace further benefiting consumers.

[7] *See, e.g.*, *Qwest Omaha Order* at 19455 ¶ 79; *see also, e.g.*, *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459, 3532 ¶ 163 (2017) ("*BDS Order*") (forbearance to reduce regulatory costs, including administrative costs, is warranted on competitive grounds), *aff'd in part, overturned in part on other grounds*, *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018); *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179, 20186-87 ¶ 21 (2004) (uniform regimes are consistent with the public interest for purposes of Section 10(a)(3)).

[8] *See, e.g.*, Petition at 5-7 nn.13-18 (citing a range of precedent from the Commission, the Supreme Court, and the D.C. Circuit); *see also* Declaration of Glenn Woroch and Robert Calzaretta, WC Docket No. 18-141, at 2-3 (attached to USTelecom's May 6 *Ex Parte* Letter) ("Absent relief from these now obsolete requirements, the Commission would be leaving in place price regulations that are no longer needed to serve their intended purpose but risk distorting market forces governing these services. By retaining these requirements, the Commission increases the likelihood that consumers will suffer the harms associated with slower ILEC investment in next-generation services and distorted entry and investment incentives of competitors that are favored by these rules."). Ultimately, as the Commission itself has long recognized, "preserving … market positions … at the expense of allowing freedom of pricing, supply and entry is not

Further, as USTelecom has made clear, consumers will not lose access to voice or broadband service as a result of the Commission granting forbearance from network unbundling and incumbent local exchange carrier ("ILEC")-specific resale requirements. First, USTelecom members have committed to making available commercial or alternative replacement services or arrangements for those locations that are presently served via unbundled network elements ("UNEs").[9] Removing a UNE does not mean removing a facility; it means only that the pricing for that facility will reflect market realities and not an artificial regulatory construct. Second, the transition will not be abrupt: USTelecom has already committed to keeping existing UNEs in place until February 4, 2021 – nearly three years after filing the petition. Third, to address any concerns about service in rural areas that lack multiple competitors, the May 6 *Ex Parte* Letter noted the Commission's ability to order partial relief at this time limited to areas subject to facilities-based competition (voice and broadband at a minimum of 25/3 Mbps).[10] In other words, the only areas where a UNE would not be available would be in areas already served by a facilities-based competitor that was able to deploy voice and robust broadband. Given that a grant of forbearance will restore competitive neutrality and eliminate market distortions without negatively impacting consumer or business access to voice or broadband service, the Section 10(a)(3) prong is easily satisfied.

2. "Digital DS0" Definition. In the May *6 Ex Parte* Letter, USTelecom proposed that the Commission forbear from enforcing unbundling requirements for *digital* DS0 loops in census blocks featuring competition from a cable provider offering service at speeds of at least 25 Mbps downstream and 3 Mbps upstream, and forbear from enforcing unbundling requirements for *analog* DS0 loops nationwide.[11] In drawing this distinction, USTelecom used the term "digital DS0 loop" to include the two types of digital DS0 loops defined in Section 51.317(a) of the Commission's rules. Specifically, the term "digital DS0" is used to encompass "digital copper loops (*e.g.*, DS0s and integrated services digital network lines), as well as two-wire and four-wire copper loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares."[12]

3. 911 Service. While some commenters have suggested the Petition might negatively affect E911 service or costs,[13] the record confirms that this is not the case. Grant of

… an appropriate way to foster competition when better alternatives exist." *Regulation of International Accounting Rates*, Fourth Report and Order, 11 FCC Rcd 20063, 20069 ¶ 14 (1996).

[9] *See, e.g.*, Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 1-2 (filed Feb. 21, 2019).

[10] May 6 *Ex Parte* Letter at 3, 8.

[11] In the Petition, USTelecom requests "nationwide" relief from Section 251(c)(3) and (4) unbundling and resale requirements and related mandates. USTelecom clarifies that the "nationwide" relief sought is limited to the nationwide footprints of price cap local exchange carriers.

[12] 47 C.F.R § 51.319(a).

[13] Comments of California Public Utilities Commission, WC Docket No. 18-141, at 3-4 (filed Aug. 6, 2018).

relief would not result in any change to ILECs supply of 911 database management services or the pricing of such services to competitive local exchange carriers ("CLECs"). The California Public Utilities Commission ("CAPUC") suggests that forbearance from unbundling obligations *might* somehow affect 911 service by promoting retirement of copper facilities.[14] But this claim is entirely speculative – CAPUC states only that "the extent to which removing the UNE requirement … might affect the 911 network availability or cost is unclear to California"[15] – and ultimately baseless: CAPUC has not even argued, much less demonstrated, that the move to next-generation fiber networks, which has been in progress for more than a decade, has in fact undermined 911 service in any community within California or elsewhere. Rather, as AT&T notes, the evidence indicates that "the relief granted by this petition would not result in any change" to how 911-related services are provisioned or priced.[16] Moreover, the Commission's copper retirement procedures would continue to provide an established process for notifying users of pending copper retirement.

4. Dark Fiber UNEs. Allegations regarding the purported effect forbearance might have on CLEC access to unbundled dark fiber ignore one key point: use of unbundled dark fiber in the marketplace today is extraordinarily uncommon. For instance, Verizon has explained that it both uses and sells a *de minimis* amount of dark fiber UNEs.[17] Moreover, where unbundled dark fiber *is* available, there are typically ample alternatives also available, ensuring that forbearance would not have a significant impact on consumers.[18] These other options include lit OCn transport, DS1 and DS3 transport available on a commercial or tariffed basis, and commercial dark fiber provided by companies such as Zayo. Additionally, dark fiber is sold overwhelmingly in counties deemed competitive[19] under the competitive market test established

[14] *Id.*

[15] *Id.* at 4.

[16] *See* Comments of AT&T, WC Docket No. 18-141, at 20 n.62 (filed Sept. 5, 2018).

[17] Comments of Verizon, WC Docket No. 18-141, at 15-16 (filed May 9, 2019) ("Verizon May 2019 Comments"); *see also* Comments of AT&T, WC Docket No. 18-141 *et al.*, at 5 (filed May 9, 2019) ("AT&T May 2019 Comments") ("Both the recently released Form 477 data and the Commission's new April Data Tables strongly confirm that the statute requires forbearance from UNE requirements for all interoffice transport services, including dark fiber transport services, on a nationwide basis."); Comments of CenturyLink, WC Docket No. 18-141 *et al.*, at 8-9 (filed May 9, 2019) ("CenturyLink May 2019 Comments") ("Between 2015 and 2018 … CenturyLink's Ethernet purchases grew substantially, and its purchase of dark fiber transport increased dramatically, *almost exclusively through arrangements with cable companies and CLECs*." (emphasis added)).

[18] *See, e.g.*, AT&T May 2019 Comments at 3 ("Cable companies, even as of 2017, had deployed service that completely bypass ILEC transport networks to almost 90 percent of the population and households" and "the newly released 'April Data Tables' show that CLECs have also deployed fiber networks that can connect to nearly 80 percent of ILEC wire centers, which means that CLECs can also bypass most ILEC interoffice transport routes using their own facilities."); CenturyLink May 2019 Comments at 8-9 (as cited *supra*, "[b]etween 2015 and 2018 … CenturyLink's Ethernet purchases grew substantially, and its purchase of dark fiber transport increased dramatically, *almost exclusively through arrangements with cable companies and CLECs*." (emphasis added)).

[19] *See, e.g.*, Verizon May 2019 Comments at 16 (citing to highly confidential information).

in the Commission's *BDS Order*.[20] In those locales, the market disciplines prices and practices far better than a forced unbundling regime can hope to manage, and at far lower cost to consumers and providers alike. In short, then, dark fiber UNEs play a negligible role in the marketplace, and those seeking access to such elements have ample alternatives available. Relief from unbundling obligations will not harm consumers and is fully consistent with the public interest.

5. Section 251(c)(4) Avoided-Cost Resale. The 251(c)(4) ILEC-specific resale mandate is only used to provision service in the robustly competitive voice marketplace, in which one-time "incumbents" play a small and ever-shrinking role. Moreover, only a tiny proportion of competitively served lines rely on Section 251(c)(4) resale, and that share continues to decline rapidly. Most recently on this point, in the May 6 *Ex Parte* Letter, USTelecom provided an analysis of resale data collected from four ILECs: AT&T, CenturyLink, Frontier, and Verizon. The data quantify total retail and wholesale lines, including Section 251(c)(4) resale lines, and excluding UNE loops.[21]

For the avoidance of any confusion, USTelecom here clarifies the data previously provided. Some of the percentages presented in the May 6 *Ex Parte* Letter did not include the underlying data; for example, the May 6 *Ex Parte* Letter stated that total resale lines fell 11 percent for these four ILECs from the end of 2016 to the end of 2018, but did not provide specific line counts. For 2016, these four ILECs reported 3,590,312 wholesales lines, which declined to 3,185,895 at the end of 2018. For ease of reference, Table 1, immediately below, lays out the data underlying the figures discussed in the May 6 filing:

Table 1:
Aggregated Wholesale and Retail Line Data for AT&T, CenturyLink, Frontier, and Verizon

Four ILECs' Aggregated Data*	Year-End 2016	Mid-Year 2017	Year-End 2017	Mid-Year 2018	Year-End 2018	2-Year Change
ILEC Wholesale Lines	3,590,312	3,467,748	3,335,083	3,227,030	3,185,895	-11%
ILEC 251(c)(4) Resale Lines**	569,460	*529,804*	489,108	*448,223*	418,794	-26%
251(c)(4) % of Wholesale	*15.9%*	*15.3%*	*14.7%*	*13.9%*	*13.1%*	
Total ILEC Retail Lines	46,905,692	44,398,353	41,536,886	38,764,202	35,926,927	-23%
Switched	36,572,366	33,977,521	31,303,978	28,819,083	26,354,294	-28%
Interconnected VoIP	10,333,326	10,420,832	10,232,908	9,945,119	9,572,633	-7%

*Aggregated data submitted to USTelecom in April 2019 from AT&T, CenturyLink, Frontier, and Verizon.
** For Mid-Year 2017 and Mid-Year 2018, 251(c)(4) resale contains straightline estimates because one company was unable to provide mid-year data.

The May 6 *Ex Parte* Letter also explained that the share of ILEC wholesale lines represented by 251(c)(4) resale was 15.9 percent at year-end 2016 and 13.1 percent at year-end

[20] *See generally BDS Order*.

[21] May 6 *Ex Parte* Letter at 12-13. USTelecom collected the data under non-disclosure agreement and presents only aggregated figures.

2018. USTelecom reported total Section 251(c)(4) resold lines of 569,460 for year-end 2016 and 418,794 for year-end 2018.[22]

Similarly, USTelecom used the share of wholesale lines represented by Section 251(c)(4) resale as of mid-year 2017 for the four ILECs (15.3 percent) to extrapolate to the broader industry and estimate the share of the wireline voice market and the share of non-ILEC lines represented by Section 251(c)(4) resale. USTelecom calculated the 15.3 percent figure by dividing the four ILECs' aggregate estimated 529,804 resold lines by their total 3,467,748 total wholesale lines as of mid-year 2017. USTelecom explains the calculations behind the extrapolation in detail in the May 6 *Ex Parte* Letter, and therefore does not repeat them here. However, for convenience and visual representation, Table 2, immediately below, lays out the data and calculations.

Table 2:
Total Resold Lines and 251(c)(4) Resale Share of the Competitive Marketplace

FCC Form 477 / VTS Data (Thousands, Mid-2017)	
Total Retail Lines	119,220
Total ILEC Retail Lines	55,786
Total Non-ILEC Retail Lines	63,434
Non-ILEC Interconnected VoIP	51,088
Non-ILEC Switched	12,346
Provided over owned last-mile facilities	4,227
Provided over UNE-L obtained from unaffiliated entity	1,772
Provided over other services obtained from unaffiliated entity	6,347
Wholesale Share of Total and Non-ILEC Retail Lines (Mid-2017)	
251(c)(4) Share of 4 Carriers' Total ILEC Wholesale Lines (USTelecom Data)	15.3%
Non-ILEC Lines Using Wholesale as Share of Non-ILEC Retail Lines (FCC Data)	10.0%
Estimated Share of Non-ILEC Retail Lines Using 251(c)(4) Resale*	1.5%
Non-ILEC Lines Using Wholesale as Share of Total ILEC and Non-ILEC Retail Lines (FCC Data)	5.3%
Estimated Share of Total ILEC and Non-ILEC Retail Lines Using 251(c)(4) Resale*	0.8%

* Assumes 6.347 million Non-ILEC voice connections nationwide using wholesale and, extrapolating from USTelecom data for 4 ILECs, 15.3% of Non-ILEC lines using wholsale are provided pursuant to 251(c)(4).

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Please direct any questions to the undersigned.

[22] It is possible to calculate the percentage attributable to Section 251(c)(4) resale for the respective periods using these figures and the wholesale lines reported above: 569,460 / 3,590,312 = 15.9 percent; 418,794 / 3,185,895 = 13.1 percent. *See* Table 1, *supra*.

Sincerely,

/s/ Patrick R. Halley
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